BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA

AB-7872
File: 20-235484 Reg: 00049683

7-ELEVEN, INC., BALJIT K. BAL, and SATINDER S. BAL, dba 7-Eleven #2235-14117
2725 Country Club Boulevard, Stockton, CA 95204,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Jeevan S. Ahuja

Appeals Board Hearing: July 11, 2002
Los Angeles, CA

ISSUED OCTOBER 2, 2002

7-Eleven, Inc., Baljit K. Bal, and Satinder S. Bal, doing business as 7-Eleven #2235-14117 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their clerk selling an alcoholic beverage to a minor decoy, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, section 22, arising from a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Baljit K. Bal, and Satinder S. Bal, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

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[1]The decision of the Department, dated August 9, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 25, 1985. Thereafter, the Department instituted an accusation against appellants charging that, on July 19, 2000, appellant's clerk ("the clerk"), sold an alcoholic beverage to 18-year-old Corinn Gallo. At the time of the sale, Gallo was working as a minor decoy for the Stockton Police Department.

An administrative hearing was held on February 16, 2001, at which time documentary evidence was received and testimony concerning the transaction was presented by Gallo ("the decoy") and by Stockton police officer Steven Leonesio.

Subsequent to the hearing, the Department issued its decision which determined that the violation occurred as charged in the accusation and no defense was established.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) the decoy operation was not conducted in a fashion that promoted fairness, in violation of Rule 141(a);[2] (2) Rule 141(b)(2) was violated; (3) the Department denied appellants the opportunity to examine critical witnesses, which violated their right to due process.

DISCUSSION

We preface our discussion of the specific issues with the basic legal standards that guide our resolution of appeals from decisions of the Department. The Department is authorized by the California Constitution to exercise its discretion whether to deny, suspend, or revoke an alcoholic beverage license, if the Department shall reasonably

[2] Rule 141 is found at California Code of Regulations, title 4, section 141.

determine for "good cause" that the granting or the continuance of such license would be contrary to public welfare or morals. The Appeals Board's review of Department decisions is limited by the California Constitution, by statute, and by case law. The Board may not exercise its independent judgment on the effect or weight of the evidence, but must determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[3]

Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (*Brookhouser v. State of California* (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].) Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (*Kirby v. Alcoholic Bev. Control Appeals Board* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the positions of both the Department and the license applicant were supported by substantial evidence); *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; *Gore v. Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

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[3]Cal. Const., art. XX, § 22; Bus. & Prof. Code §§23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

I

Appellants contend two decoys were used in this premises, but since only one, Corinn Gallo, appeared at the hearing, the findings of the Administrative Law Judge (ALJ) that the second decoy, Jennie Halliday, presented the appearance of a person under 21 years of age and that the decoy operation was not conducted in an unfair manner, were erroneous.

It is true that Halliday accompanied Gallo throughout the time Gallo was in the premises, but when Gallo, who carried the beer, approached the counter, Halliday stopped about three feet from the counter, and Gallo went to the counter alone and purchased the beer from appellants' clerk. (Findings VI-B; VIII-1.) As the ALJ noted, there was only one decoy to whom an alcoholic beverage was sold in this premises – Gallo – and only Gallo was "the decoy" for purposes of Rule 141.

Appellants contend the ALJ erred in finding that Halliday presented the appearance of a person under the age of 21 because he did not see Halliday and based his finding solely on the descriptions of Halliday in the testimony of Gallo and Leonesio. In Finding VIII-1, which explains the ALJ's conclusion that the fairness requirement of Rule 141(a) was not violated, the ALJ states: "It is noted that evidence provided by the Department about Ms. Halliday indicates that she presented the appearance of a person under 21 years old. (See Findings of Fact No. VII.)"

Because the ALJ did not see Halliday, he based his conclusion, of necessity, on the testimony of Gallo and the officer. He summarized the testimony in Finding VII:

> "Ms. Gallo testified the Ms. Jennie Halliday was 5'9" or 5'10" tall and weighed 125 pounds; she added that Ms. Halliday wore no lipstick or blush on the date of this incident but she wore some mascara and that she had shoulder length brown hair. Officer Leonesio testified that Ms. Halliday has a young looking face, and that she is tall and lanky. He added that her mannerisms – jolly, giggly –

> were those of a person out of first year of college; in addition, she had some acne marks on her face."

That testimony was unrebutted, and constitutes substantial evidence sufficient to support the finding.

As this Board has noted before, "the real question to be asked when more than a single decoy is used is whether the second decoy engaged in some activity intended or having the effect of distracting or otherwise impairing the ability of the clerk to comply with the law." (*Chevron* (2002) AB-7790.) The ALJ stated, in Finding VIII-1, that appellants offered no evidence, and there was "no evidence to suggest, that [the clerk] was influenced in any way by Ms. Halliday's presence in the store. Therefore, there is no evidence that the decoy operation was conducted in an unfair manner."

Appellants assert that the Department must, at the outset, "demonstrate that there is substantial evidence to conclude that the decoy operation was conducted in a fair manner," before appellants are required to present any evidence that the decoy operation was conducted unfairly. Appellants misunderstand the differing natures of the various burden-of-proof standards. The requirement of "substantial evidence" to support a Department decision is the standard used by this Board, and the appellate courts, when reviewing a decision. The ultimate burden of persuasion at the administrative hearing is the preponderance of the evidence. The Department's initial burden of producing evidence, however, is merely to make a prima facie case, that is, to produce sufficient evidence to support a finding in its favor in the absence of rebutting evidence.

In *7-Eleven and Azzam* (2001) AB-7631, appellants argued that the Department had not met its burden of proving that Rule 141(b)(5) had been complied with because

no specific evidence was presented of the sequence of events to show that the face-to-face identification had been made before the citation was issued to the clerk who sold the alcoholic beverage to the decoy. They cited the Board's decision in *The Southland Corporation / R.A.N.* (1998) AB-6967 as the basis for their contention. We disagreed, saying,

> "In our view, once there has been affirmative testimony that the face to face identification occurred, the burden shifts to appellants to demonstrate why it did not comply with the rule, i.e., that the normal procedure, for the issuance of a citation following the identification of the accused, was not followed. We are unwilling to read our decision in The Southland Corporation/R.A.N. as expanding the affirmative defense created by Rule 141 to the point where appellants need produce no evidence whatsoever to support a contention that there was a violation of that rule."

The evidence presented by the Department in the present case was clearly sufficient to allow the ALJ to conclude that the violation had occurred and that the decoy operation was conducted fairly; it was appellants' burden at that point to present evidence rebutting that evidence. If appellants chose not to present any evidence, but to rely solely on their mistaken belief that the Department had not met its initial burden of producing evidence, they have no basis for complaint on appeal.

II

Appellants contend Rule 141(b)(2) was violated because the ALJ did not determine whether the "second decoy," Halliday, met the requirement of the rule that a decoy must display the appearance generally to be expected of a person under the age of 21.

There was only one decoy for purposes of Rule 141 – Gallo. The ALJ did not need to make a Rule 141(b)(2) determination with respect to Halliday.

As discussed above, the ALJ was justified in finding, as he did, that there was no

evidence that Halliday's presence had any influence on the clerk's behavior when selling the beer to Gallo. If appellants had a basis for believing this not to be true, they were obliged to present evidence to that effect. They did not do this and have no basis now to complain.

III

Appellants contend they were denied the opportunity to examine critical witnesses, which denied them due process. They argue that the Department violated Business and Professions Code section 25666 by not requiring Halliday to attend the hearing and that they were denied their right to discovery of the identities of other licensees who sold to the two decoys.

Business and Professions Code section 25666 provides:

> "In any hearing on an accusation charging a licensee with a violation of Sections 25658, 25663, and 25665, the department shall produce the alleged minor for examination at the hearing unless he or she is unavailable as a witness because he or she is dead or unable to attend the hearing because of a then-existing physical or mental illness or infirmity, or unless the licensee has waived, in writing, the appearance of the minor."

Corinn Gallo was the only decoy who purchased an alcoholic beverage at appellants' premises and was the only minor named in the accusation. Therefore, she was the only minor the Department was required to produce at the hearing. If appellants believed Jennie Halliday was necessary for their defense, they could have subpoenaed her, which they did not do.

Appellants assert that they only discovered at the hearing that "Gallo was involved in one other sale of alcohol to a minor at an additional licensed premise that evening." (App.Br. at 19.) Not having received this information during discovery, they contend, unfairly deprived them of "an opportunity to present relevant testimony."

(Ibid.) They insist that, even though the police did not provide this information to the Department, "[t]he Department should have inquired whether or not both decoys together were involved in similar purchases of alcohol and furnished the Appellants with the identity of that licensee." (Ibid.)

Appellants are in error. The Department is not required to do appellants' investigation for them. Appellants had the police report that indicated that two minors entered this premises. They apparently did not pursue this information to find out who the other minor was. Had they done this, presumably they would have discovered before the hearing that a violation involving Halliday occurred at another premises that night, and that Gallo accompanied her in that premises.

At the hearing, appellants' counsel acknowledged that, at that point, appellants were not entitled to discovery under the Administrative Procedure Act. However, they always had the ability to subpoena the police reports and witnesses they now contend they were unable to examine. Indeed, the ALJ at the hearing granted appellants' motion for a continuance so they could do just that, and a continued hearing was set for June 5, 2001. However, in a letter dated May 14, 2001, appellants informed the ALJ and the Department that they no longer desired a continued hearing, but would submit the matter on the record. They asked only that the ALJ consider whether there were violations of subdivisions (a), (b)(1), (b)(2), (b)(4), and (b)(5) of Rule 141.

Appellants' complaints are baseless and border on being frivolous; appellants simply did not pursue the information with which they were provided. For them now to say they were denied due process makes a mockery of that constitutional right.

ORDER

The decision of the Department is affirmed.[4]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[4]This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code §23090 et seq.